Proskauer

Summary of Certain Provisions of the CARES Act for Private Credit Lenders

March 26, 2020

CARES Act (H.R. 748)

Summary of Certain Material Provisions for Private Credit Lenders

***Note**: The below is a high-level summary only and is not intended to reflect all details contained in the legislation. In addition, much is still unclear with respect to the implementation of these programs and their impact on private credit lenders. We are monitoring the corresponding regulations and will update as new information becomes available.*

The Senate has passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") providing for an unprecedented $2 trillion in economic stimulus. The Paycheck Protection Program is the primary loan program for small businesses with less than 500 employees while the Coronavirus Economic Stabilization Act of 2020 provides the largest potential impact with up to $454B available to provide liquidity to covered businesses through subsection (b)(4). Of particular interest to private credit lenders, loans under both the Paycheck Protection Program and the Coronavirus Economic Stabilization Act of 2020 may be provided by banks and other lenders, which may include private credit lenders, subject to the final regulations. Lenders should also consider whether their existing credit agreements would permit loans provided under these programs to be layered into the capital structure of their borrowers, potentially on a senior or pari basis with existing loans. Below please find an overview of select provisions of these programs as well as the Employee Retention Credit for Employers Subject to Closure (an alternative to the Paycheck Protection Program providing a refundable payroll tax credit for eligible payroll costs).

	Paycheck Protection Program	Employee Retention Credit for Employers Subject to Closure	Coronavirus Economic Stabilization Act of 2020

Appropriation	$349B		$500B

Eligibility	Available to small business concerns and any other business concern with no more than 500 employees (or, with respect to accommodation and food service businesses, 500 employees per physical location) Affiliation rules are disregarded for (i) any accommodation or food service business concern with less than 500 employees, (ii) any business concern that is a franchise, and (iii) any business concern that receives financial assistance from an SBIC fund	Available to any employer whose operations were fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority due to COVID-19 or who had gross receipts for such calendar quarter less that are less than 50% of gross receipts for the same quarter a year prior (phases out when receipts go back above 80%) For employers with more than 100 employees, only applies to wages paid with respect to employees not providing services due to COVID-19	An eligible business would be an air carrier or a United States business that has suffered a covered loss and not otherwise received adequate economic relief in the form of loans or guarantees provided under the Cares Act. (b)(1) $25B allocated to passenger air carriers, (b)(2) $4B allocated to cargo air carriers, (b)(3) $17B allocated to business critical to national security, (b)(4) $454B allocated to provide liquidity to other eligible business

			Secretary shall make loans and loan guarantees to, and other investments in, programs or other facilities established by the Board of Governors
Provider of Funds	Existing 7(a) SBA lenders and additional lenders determined by the Administrator to have the necessary qualifications to process, close, disburse and service loans made with the guarantee of the Administration Loans are 100% guaranteed by the SBA	Paid as a reduction to applicable employment taxes for such calendar quarter, with amounts in excess of any such taxes treated as an overpayment and refunded	Secretary shall endeavor to implement a program that provides financing to banks and other lenders that make direct loans to eligible businesses with between 500 and 10,000 employees with such direct loans being subject to an annualized interest rate that is not higher than 2% per annum *(for fewer than 500, see the Paycheck Protection Program)*

Maximum Amount	The lesser of (i) (a) average monthly payments for payroll costs (x) for the TTM period before the date the loan is made, (y) with respect to seasonal businesses, for the 12 week period beginning 2/15/19, or (z) with respect to new businesses, for the period from 1/1/20-2/29/20 multiplied by (b) 2.5 and (ii) $10,000,000	50% of qualified wages with respect to each employee for such calendar quarter (lifetime cap of $10,000 of wages per employee) Limited to wages paid after 3/12/20 and before 1/1/21	Not specified

	Interest is capped at 4%		Market rate (determined before the impact of COVID-19) for a transaction of similar risk.
Interest and Fees	No fees, but SBA will reimburse Lenders for processing expenses in an amount equal to 5% of loans of not more than $350K, 3% of loans of more than $350K but less than $2M and 1% of loans of not less than $2M	N/A	Secretary to receive, in its discretion, a warrant or equity interest in the eligible business or a senior debt instrument issued by such eligible business described in subsections (b)(1), (b)(2) and (b)(3)
Use of Proceeds	Payroll costs; costs related to the continuation of group health care benefits, employee salaries; payments of interest on mortgage obligations; rent; utilities; and interest on any other debt incurred before the covered period	Unrestricted	Not specified, but must retain at least 90% of the workforce at full compensation and benefits through 9/30/2020

	Lenders must provide complete payment deferment for impacted borrowers for at least 6 months (and not more than 1 year)		
Repayment	Loans are forgiven in an amount equal to all Payroll costs, payments of interest on any covered mortgage, payments on any covered rent obligation, and any covered utility payment. Upon forgiveness, the Administrator will remit to the lender within 90 days the amount of such forgiveness plus any interest accrued through the date of payment. Forgiveness does not result in CODI for the business. Loan forgiveness is reduced by a percentage equal to any employee reductions during the covered period or salary reductions of greater than 25% (with an exception for employees re-hired by 6/30/20)	N/A	Any direct loan pursuant to subsection (b)(4) shall not require P&I payments for the first 6 months Duration of loan to be as short as practicable but not longer than 5 years Loans may not be forgiven

Collateral	None required; no personal guarantees	N/A	Loans described in subsections (b)(1), (b)(2) and (b)(3) to be sufficiently secured or priced to take into account such risk No specific mention of whether the loans may be priming

			Eligible recipient must make a good faith certification that: (a) Loan support is necessary to support ongoing operations because of current conditions; (b) Funds will be used to retain at least 90% of workforce, at full compensation and benefits, until 9/30/20; (c) Recipient intends to restore not less than 90% of workforce that existed before 2/1/20, and to restore all compensation and benefits to workers no later than 4 months after HSS declares COVID-19 emergency is over; (d) Recipient is
Borrower certification	Eligible recipient must make a good faith certification that: (a) Loan support is necessary to support ongoing operations because of current conditions; (b)Funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; (c)Recipient does not have an application pending for a loan under this subsection for	N/A	

				Credit must not be reasonably available at the time of the transaction
Other	No requirement that the business concern be unable to obtain credit elsewhere Administrator to issue guidance to lenders to ensure loans prioritize small business concerns and entities in underserved and rural markets	Does not apply to employers that have received a loan through the Paycheck Protection Program	Limitations on recipient's executive compensation during the term of the loan and 1 year thereafter including: (1) no permitted increases in compensation for employees with total compensation exceeding $425k in 2019 with a 2x compensation limit on severance and (2) compensation capped at the sum of $3m and 50% of 2019 total compensation in excess of $3m. "Total compensation" includes salary, bonuses, awards

Timing for Regulations	15 days	N/A	10 days

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

Related Professionals

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